THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 08-CP-40-8854

Phillip D. Grimsley, Sr., and
Roger M. Jowers, on behalf of
themselves and others similarly situated,

Appellants,

vs.

South Carolina Law Enforcement Division
and the State of South Carolina,

Respondents.

APPELLANTS' INITIAL REPLY BRIEF

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I. The ministerial act of transferring funds does not cure SLED's violation of state law.

SLED argues that since the retirement contributions were not physically deducted from the Appellants' paychecks, Section 9-11-90 was not violated because SLED "paid" the contributions, regardless of how SLED acquired the money. Under SLED's logic, that code section simply requires the employer to physically send the money to the retirement system. However, while that statute may encompass the ministerial act of transferring funds, its not *limited* to that act. S.C. Code § 9-11-225 sets forth the employer and employee contribution rates. When read in conjunction with section 9-11-90, it is clear that the law requires the employer to provide the funds in the appropriate percentage -- an amount allocated to it for retirement contributions-- while the employee contributes a different percentage.[1] Instead, SLED is trying to use those funds for other purposes, in effect, playing a shell game with the monies by forcing Appellants to fund the employer portion (in addition to the employee portion) through reduced salaries.

SLED also attempts to recast Appellants' arguments into a claim that the overall salary amount must be the same on rehire; that is not Appellants' argument Appellants simply assert that an employee's salary cannot be reduced for an illegal or unconstitutional purpose, such as forcing the employee to fund the statutorily prescribed employer contribution.

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[1]Furthermore, the State's retirement act should be liberally construed in favor of those to be benefitted and objects sought to be accomplished. *King v. S. Carolina Ret. Sys.*, 319 S.C. 373, 461 S.E.2d 822 (1995). Thus, where the Act requires the employer to contribute a specified amount to retirement, it must be read in favor of Appellants and against Respondent's interpretation that employers can offset or shift its burden to the employee.

Respondent claims that the 1999 change to Section 9-11-90 was no effect as to who should pay the employer contribution for working retirees but was simply a clarification that an employer contribution must be made. However, every part of a statute must be given effect. *Crescent Mfg. Co. v. Tax Comm'n*, 129 S.C. 480, 124 S.E. 761 (1924). Prior to the 1999 change, the statute was silent as to employer contributions. After the 1999 amendments, the statute provided that the employer must fund the employer contribution just as they did for active members: "[a]n employer shall pay to the system the employer contribution for active members prescribed by law with respect to any retired member engaged to perform services for the employer, regardless of whether the retired member is a full-time or part-time employee or a temporary or permanent employee." S.C. § 9-11-90 (1999). By forcing to Appellants to fund or offset the employer contribution, SLED is not treating the Appellants in the same manner as active members.

SLED also claims that Appellants have no standing to challenge any funds misappropriated by SLED because they made a break from the former salaries on retirement and have more standing that any other citizen. However, standing is conveyed when a plaintiff has an "injury in fact"-an invasion of a legally protected interest -- and where there is be a causal connection between the injury and the conduct complained of. *Smiley v. S. Carolina Dep't of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007). As employees of SLED who contributed to PORS (even after being rehired) and whose constitutional rights were violated when SLED cut their salaries in order to fund the employer contribution, the standing requirement is clearly met. Respondent argues that Appellants made a break with their salaries upon retirement and thus, had no standing to challenge SLED's use of the funds. However, Appellants were still employees of SLED until 2008 and were contributing members of PORS.

Appellants actually shouldered the burden of funding other members retirement because in addition to their employee contributions,[2] their salaries were decreased. Contrary to SLED's claim, Appellants have suffered an particularized injury rather than any general injury to all South Carolina citizens. Otherwise, such conduct could escape review.

Furthermore, in a matter of such public importance, standing can be conferred "without requiring the plaintiff to show he has an interest greater than the other plaintiffs." *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007). An agency should not be able to evade review for conduct that is capable of repetition and is imperative to establish a rule for future conduct in matters of public interest. *Sloan v. Dep't of Transp.*, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008). The issue in this case can reoccur each time an agency attempts to shift its employer burden to the employees and seeks appropriations (thus, every year) and should be resolved to provide future guidance. Id.

Moreover, there are clearly facts and admissions by SLED to indicate money has been misappropriated or misused. SLED has acknowledged reducing Grimsley's salary from $52,896 to $42,318, despite the fact that it was appropriated the full salary and the employer contribution based on that amount. R.p. __ In other words, SLED requests appropriation of Grimsley's full salary, then lowers that salary by the amount of required employer contribution -- despite the fact that SLED was also appropriated that contribution based on Grimsley's full salary-- and then uses those "savings" for other purposes, such as salaries or benefits for other employees. SLED is being disingenuous in its appropriations requests to the General Assembly and its claims to the court.

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[2]Furthermore, the contributions of Appellants/retired employees did not result in any additional service credit for Appellants. S.C. Code 9-11-90(4)(c).

II. Appellants' have a property interest rooted in state law.

Respondent argues that because it did not have to re-hire Appellants, there can be no property interest in their salaries. However, Respondent ignores that because it did reemploy Appellants, it must treat he same as any other member and that SLED must "**pay to the system the employer contribution for active members** prescribed by law with respect to **any retired member**...." (emphasis added). Under the law, SLED is not permitted to reduce the salaries to offset employers' portion of retirement. This statutory right constitutes a property interest. While the facts in *Bell v. S. Carolina Dept. of Corr.*, 397 S.C. 320, 337, 724 S.E.2d 675, 684 (2012) (cited in Appellants' initial brief) are not exactly the same in this case,[3] the important holding there was the South Carolina Supreme Court's reiteration of its earlier holding in this case, that the

> "takings claim [was] predicated on their entitlement to retain the percentage of their salary—13.6%—that was used to pay the employer portion of the retirement contributions." *Id.* at 285, 721 S.E.2d at 428. Accordingly, we concluded that section 9–11–90 provided a basis for Appellants to assert a cognizable property interest rooted in state law that was sufficient to survive Respondent's motion to dismiss. Id.

Bell v. S. Carolina Dep't of Corr., 397 S.C. 320, 337, 724 S.E.2d 675, 684 (2012). The Supreme Court acknowledged and affirmed that the statutory right in Bell and the statutory right in right in Grimsley, were the same and that the state could not "through an internal policy, deprive Appellants of these interests rooted in state law." Thus, despite the factual differences in *Bell*, there is clearly a state law interest to support a taking.

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[3]The Bell case involved plaintiffs who had a right to be recalled up to one year after a reduction in force.

III. There is no consent or waiver that bars Appellants' claims.

SLED argues that Appellants signed documents entitled "Request to be Rehired" in which they "agreed" to be rehired a reduced salary in order to "cover the amount it will cost SLED to pay the employer portion of retirement." First, the "agreements" were forms created by SLED, and do not contain language upon which the parties negotiated. If Plaintiffs did not sign the form, they could not be rehired. Secondly, agreements in violation of statutory or constitutional law will not be enforced. *Beach Co. v. Twillman, Ltd.,* 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002) (An illegal contract is unenforceable).

In response to Appellants' argument that Section 9-11-90 creates rights that could not be waived as a matter of public policy, SLED claims that the only policy therein is that an employer cannot rehire a retiree and refuse to make a contribution to the retirement system. SLED again asserts that it has made this contribution, but again, SLED is relying on a ministerial act, and, as discussed above, the statute goes beyond ministerial acts. The retirement program created by SLED required Appellants to fund the employer portion of retirement by these forced reduction of salary. SLED is not simply saving money as it argues is mandated by the General Assembly, but forcing Appellants to fund their own retirement.

IV. Appellants are not estopped from pursuing their claims.

SLED claims that the conduct of Appellants estops them from now pursuing this action. SLED argues that Chief Stewart would not have offered the program to Appellants if he knew that they would challenge SLED's wrongful acts. However, Chief Stewart does not assert, and the record does not support that SLED suffered the required definite, substantial, detrimental change of position in reliance of Appellants' actions. Had Appellants remained as regular employees, SLED would have had to pay Appellants' salaries, without the reduction of 13.6% for

employer contributions, as well as the employer portion of the retirement contribution.

V. The Statute of Limitations Does Not Bar Appellants' Claims.

Respondents argue that the Appellants entered the program in 2004, but did not bring this lawsuit in 2008, and thus, their action is barred by the statute of limitations. However, the statute of limitations began to run anew every time Defendants issued a paycheck to Plaintiffs that was 13.6% less than it should have been, due to SLED's improper withholding of that amount to pay the employer retirement contribution for Plaintiffs. *See, e.g. Tilley v. Pacesetter Corp.*, 333 S.C. 33, 42, 508 S.E.2d 16, 20 (1998)("Accordingly, although we find the three year statute of limitations applicable, it begins to run from each payment [in violation of the statute], such that plaintiffs' claims are not barred.").[4] Thus, Plaintiffs can recover for the three years prior to the filing of the Complaint through the current date.

CONCLUSION

For the reasons set forth herein, this Court should reverse the grant of the summary judgment to Respondents and remand the case for trial.

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[4]*See also, Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 358, 559 S.E.2d 327, 337 (Ct. App. 2001)(A new statute of limitations begins to run after each separate invasion of property.)

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PROOF OF SERVICE

I, Connie W. Grugan, secretary to the law firm of Lewis, Babcock & Griffin, L.L.P., hereby certify that I have served a copy of Appellants' Initial Reply Brief upon opposing counsel by mailing a copy of same, postage prepaid and address clearly indicated, to said opposing counsel addressed as follows:

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This 25th day of April, 2013.

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April 25, 2013

Honorable Jenny Abbott Kitchings
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Re: Phillip D. Grimsley, Sr., et al. v. South Carolina Law Enforcement Division and The State of South Carolina, Civil Action No. 2008-CP-40-08854
Our File No. 08-527
Appellate Case No. 2012-212815

Dear Ms. Kitchings:

Enclosed please find Appellant's Initial Reply Brief in regard to the above-referenced matter for filing with your office. Please return to me a clocked copy in the envelope provided.

By copy of this letter, we are hereby serving a copy of same upon opposing counsel.

Very truly yours,

LEWIS, BABCOCK & GRIFFIN, L.L.P.

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Enclosure
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